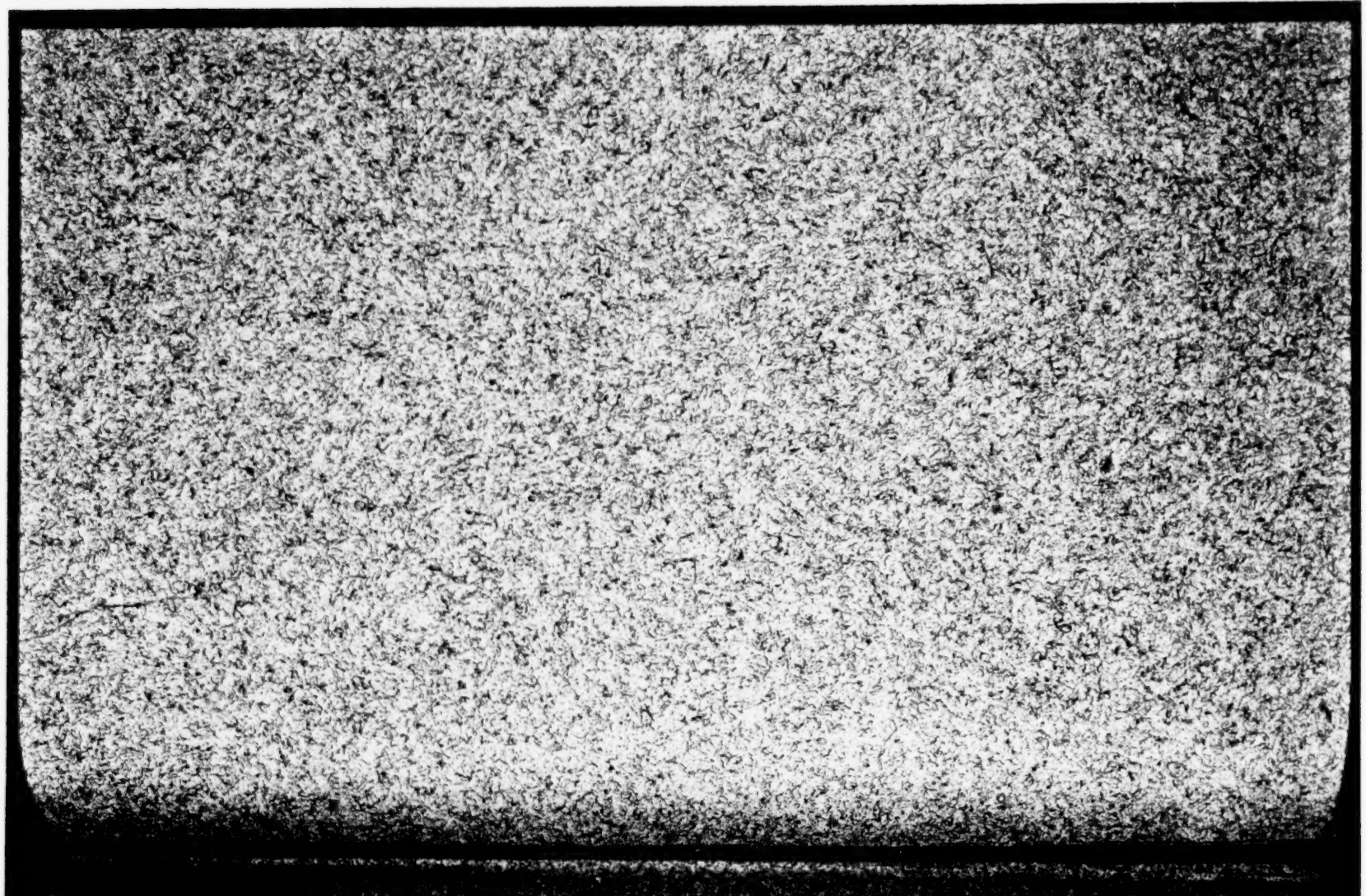

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 154

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Petitioner,

vs.

E. E. JOHNSON, ADMINISTRATOR OF BENJAMIN F. COOKSEY, DECEASED,

Respondent.

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In the brief of the respondent it is contended that physical disability fixed liability for previous waiver; that the occurrence of the disability and not the furnishing of proof fixed the liability of the company. This contention, in the face of *Bergholm v. Peoria Life Insurance Co.*, 284 U. S. 489, 52 S. Ct. 230, is unsound and untenable. It is impossible to read the policy now before the Court and the one in the *Bergholm* case and arrive at any other conclusion. The two policies are identical. Both provide for waiver of premium upon receipt of proof of the total and permanent disability of the insured while the policy is in force and all premiums due prior to the time of making claim paid.

In the contract in the *Bergholm* case the language is:

> "Upon receipt by the Company of satisfactory proof that the insured is totally and permanently disabled * * * * * * the Company will:
>
> "1. Pay for the insured all premiums becoming due hereon after receipt of such proof and during the continuance of the total and permanent disability to the insured, and will also
>
> "2. Pay to the insured a monthly income for life * * * * * * the first payment of such income to be made immediately upon receipt of such proof * * * ."

The language in the contract here is:

> "If the insured * * * * * * shall furnish to the Company due proof that he is totally and permanently disabled * * * * * * the Company will grant the following benefits during the remaining lifetime of the insured so long as such disability continues:
>
> "(a) The Company will pay a monthly income * * * * * * beginning upon receipt of due proof of such disability * * * * * *
>
> "(b) The Company will also, after receipt of such due proof waive payment of each premium as it thereafter becomes due during such disability."

The two contracts cannot be distinguished. Adopting the language of Mr. Justice Sutherland, who delivered the opinion in the *Bergholm* case, supra, " * * * * * * the obligation of the Company does not rest upon the existence of the disability; but it is the receipt by the Company of ***proof*** of the disability which is definitely made a ***condition precedent*** to an assumption by it of payment of the premium ***becoming due after the receipt of such proof.***"

The counsel for respondent point out on page 8 of their

brief, that the primary assumpsit of the Company expressed on the face of the policy say not a word about proofs of disability as a condition precedent to waiver of the premiums but mention only proof of death. This is true but the assumpsit with reference to waiver of premiums is immediately qualified by reference to section 3 of the policy, where the conditions are set out, and as the Court of Appeals below (R-86) said:

> "* * * * * * * no one turning to Section 3 could fail to understand that it limits the promise on the face of the policy in several respects."

In *Continental National Bank & Trust Co., etc., v. New York Life Insurance Co.,* (Illinois, not yet officially reported) the provisions of the policy are as follows:

> "New York Life Insurance Company agrees to pay to Isaac and Molly Spilky, parents of the insured, share and share alike, Beneficiaries, Two Thousand Dollars (the face of this policy) upon receipt of due proof of the death of Joseph L. Spilky, the insured;
>
> "And the Company agrees to pay to the insured one-tenth ($200.00) of the face of this policy per annum during the lifetime of the insured, if the insured becomes wholly and permanently disabled before age 60, *subject to all the terms and conditions contained in Section 1 hereof.*"

Section 1 referred to is the total and permanent disability benefits and provides:

> *"Whenever* the Company receives *due proof,* before default in the payment of premium, that the Insured, before the anniversary of the policy on which

the Insured's age at nearest birthday is 60 years and subsequent to the delivery thereof, has become wholly disabled by bodily injury or disease so that he is and will be, presumably, thereby permanently and continuously prevented from engaging in any occupation whatsoever for remuneration or profit, and that such disability has then existed for not less than sixty days, * * * * * * then

"(1) Waiver of Premium. Commencing with the anniversary of the policy *next succeeding* the receipt of such proof, the Company will on each anniversary waive payment of the premium for the ensuing insurance year * * * * * * ."

In the case last quoted the insured became insane and by reason of his insanity was unable to and did not notify the company of such disability. The action was to recover premiums paid and annual income from date of disability. It was contended by the plaintiff that the insanity of the insured excused furnishing of proof and that he was entitled to recover back the premiums paid.

In construing the policy, which is identical with the one at bar, especially in regard to the primary assumpsit on the face of the policy, the Court said:

"Under the provisions of Section 1 of the policy, as above set forth, we think it clear that *until* the Company received "due proof" of insured's disability, occasioned by bodily injury or disease, it was not required to waive the payment of any premium and was not liable to pay any disability benefits * * * * * . We regard the receipt by it of such proof as a condition precedent to its being required to waive payment of any premium, and to its liability to pay disability benefits."

Counsel for respondent rely upon *Minnesota Mut. Life*

Ins. Co. v. Marshall, 29 F. (2d) 977, as controlling in the case at bar. An examination of the policy in that case however will disclose that there the Court had before it an entirely different contract. In the *Marshall* case the obligation of the Company rested upon the existence of the disability. In the case at bar it is upon receipt of due proof. The *Marshall* case was clearly distinguished by *Bergholm v. Peoria Life Ins. Co.*, supra, when the Court said:

> "The pertinent provisions there, however, differ from those found in the policy here under consideration. There the policy provided that if the insured, while the policy is in force and before default in the payment of premium, shall become totally and permanently disabled * * * * * and shall furnish satisfactory proof thereof, the Company will waive the payment of all premiums thereafter becoming due. The Court held that the waiver took effect at the time of the disability, and did not depend upon the time when proof thereof was furnished.
>
> "We do not need to controvert this construction of words quoted, or question the soundness of the view of the Court that the existence of the disability before the premium became in arrears, standing alone, was enough to create the waiver. In that view, the obligation to furnish proof was no part of the condition precedent to the waiver; but such proof might be furnished within a reasonable time thereafter. *Here the obligation of the company does not rest upon the existence of the disability; but it is the receipt by the company of proof of the disability which is definitely made a condition precedent to an assumption by it of payment of premiums becoming due after the receipt of such proof.*"

In the case at bar the condition is not "if the insured be-

comes disabled" as in the *Marshall* case, but is "if the Company receive due proof" of the disability, as in the *Bergholm* case.

The *Marshall* case has also been distinguished by *Orr v. Mutual Life Ins. Co.*, 64 F. (2d) 561, and *Western and Southern Life Ins. Co. v. Smith,* 41 Ohio App. 197, 180 N. E., 749, the policy in both cases being identical with the one now before this Court.

Assuming, however, that the *Marshall* case is controlling, and the present policy is ambiguous, the obligation of the Company to waive premiums would only relate back to the date of the disability, at which time the premium of November 16, 1931, was already due. The evidence discloses that the insured did not become disabled until about December 14, 1931, which was during the days of grace. In this policy and in the policy in the *Marshall* case the premiums to be waived were only those *thereafter* becoming due and not those already due. There is no provision in the policy at bar to waive payment of premium becoming due before disability ensues. In *Brams v. New York Life Ins. Co.,* 299 Pa. 11, 148 A. 855, quoted with approval by this Court in the *Bergholm* case, it was said:

> "Even if sufficient proof of total disability had been furnished within the grace period, it would have been insufficient because the failure to supply it prior to 'the default' defined in the policy as to the time when the premium was by its terms fixed as payable *notwithstanding the special benefit granted of leave to make payment within a month thereafter.* As said by the Court below all 'that the waiver obviously was intended to cover was in regard to premiums falling due after the occurrence of a state of total disability, not premiums which fell due while

the insured was still *in a state of good health.'* In the present case, there was no proof of a total disability as designated in the policy, either before the payment became due or during the month's grace thereafter." (Italics ours.)

See also *New England Mut. Life Ins. Co. v. Reynolds,* 217 Ala. 307, 116 So. 151.

Counsel for respondent on page 9 of their brief are also relying upon the supplemental benefits found on page 4 of the policy to attach liability on the Company. It is clear that the intention of the parties here was to give to the insured during his lifetime a right to reinstate his policy where he had become disabled prior to the due date of the premium in default without evidence of insurability. The right here imposes on the insured or someone for him the duty to furnish proof to the Company, during his lifetime, that he was totally and permanently disabled prior to November 16, 1931, the due date of the premium in default. This was not done, and even if it had, no liability would have attached since the insured was not disabled on said date. *The right was not intended to survive the insured.*

In *Brams v. New York Life Ins. Co.,* supra, a similar supplementary benefit as contained on page 4 of the policy was construed and held that the supplementary benefits did not aid the beneficiary.

The respondent on page 21 of their brief further contend that this case is controlled by Section 4228 of the Code of Virginia, providing that no action on a policy of life insurance shall be contested for any cause after it has been in force one year except for non-payment of premium. We must admit that we cannot follow the line of argument of respondent or see that it is logical reasoning.

The defense of the Company in this action is wholly on the ground of non-payment of the November 16, 1931, premium, and because of the non-payment the policy under Section 12 of the policy has lapsed and is now of no effect. The respondent in his pleadings (R-1) admits the premium was not paid but alleges that the policy did not lapse under the total disability provision of the policy which provided for waiver of premium upon receipt of proof. The Company is also defending upon the ground that the insured was not totally and permanently disabled on the due date of the premium in default. We cannot see that Section 4228, Code of Virginia pertains to this action in any particular.

Counsel for respondent on pages 6 and 25 of their brief further contend that Sections 4315 and 4317, Code of Virginia is likewise controlling. Section 4315 of the Code forbids the issuance of any policy of insurance against loss or damage from disease or by bodily injury by accident or both, unless it contains in substance the provisions set out on page 6 of their brief. Respondent omitted the most important part of said section, however, which provides that:

> "No policy of insurance * * * * * * shall be issued or delivered in this state *until a copy of the form thereof and the table of rates or manual of risks of the company has been filed at least thirty days with the Commissioner of Insurance* * * * * * * (Italics ours).

It is only violative of Section 4315 of the Code when the Company has failed to deliver a copy of the form or a schedule of rates with the Commissioner of Insurance. There is no evidence in the record that this has not been

done, or that the Company has failed to comply with this provision. It would appear that Counsel for the respondent are trying to confuse the Court on the real issues, else why should the material portion of said section be omitted.

To the same effect is Section 4317, Code of Virginia, cited on page 6 of their brief. Only a part of said section is quoted. Frankly we cannot see its purport as it has nothing to do with the issues here involved, and tends only to confuse the other issues.

The sole question involved in this action, contained on page 27 of respondent's brief, pertains to physical or mental capacity of the insured to furnish proof of his disability. Counsel have cited several cases to uphold their contention that such incapacity excuses the insured from furnishing proof of disability.

The cases cited are for the most part health and accident or fire insurance cases. The decisions in the life insurance cases cited are instances in which the respective courts have gone out of their way to find an ambiguity. For instance, the case of *Levan v. Metropolitan Life Ins. Co.*, 138 S. C., 253, 136 S. E., 304, relies upon *North American Accident Ins. Co. v. Watson*, 6 Ga. App. 193, 64 S. E. 693 (also relied upon by respondent) a health and accident case, holding the insured is excused from furnishing proof of the disability if incapacitated to do so, yet the rule in Georgia is just the reverse. See *Northwestern Mut. Life Ins. Co. v. Dean*, 43 Ga. App. 67, 157 S. E. 878, affirmed in 157 Ga. 321, 165 S. E. 235.

Rhyne v. Jefferson Standard Life Ins. Co., 196 N. C. 717, 147 S. E. 6, followed the Levan case as well as several health and accident cases, including *Roseberry v. American Benev. Ass'n*, 142 Mo. App. 552, 121 S. W. 785, likewise cited by respondent. *Swann v. Atlantic Life Ins.*

Co., 156 Va. 852, 159 S. E. 192, followed with approval both the *Levan* and *Rhyne* cases as well as *Minnesota Life Ins. Co. v. Marshall*, 29 F. (2d) 977.

In none of the foregoing cases is the contract logically construed. For instance, in the Swann case, supra, the court, without referring to the contract before it, collects the results of the various cases without reference to the language used in the policies in said cases, and concludes that "it would be unreasonable to say that he (the insured) should present proofs to the company if he were insane or unconscious." We contend that the courts in the three above-mentioned cases did not properly construe the language of the policies before them, but instead went out of the way to find an ambiguity, otherwise not existing.

In *Iannarelli v. Kansas City Life Ins. Co.* (W. Va. 1933) 171 S. E. 748, citing the *Swann* and *Rhyne* cases, it was said:

> "With the greatest deference to the learning and high authority of the courts which adopt the holding that the giving of notice or the furnishing of proof of disability is a condition subsequent, we are of the opinion that in reaching such a conclusion the contract between the insurer and the insured has sometimes been *relegated* to a position of secondary importance instead of being accorded to it the primary importance to which it is entitled. This line of cases discloses two characteristics: (1) 'Total disability' clauses are held to be ambiguous and a construction is adopted most favorable to the insured. Illustrative: *Minnesota Mutual Life Ins. Co. v. Marshall* (C.C.A.) 29 F. (2d) 977. (2) Cases arising from accident insurance contracts are relied on to sustain the proposition that the giving of notice of disability is a condition subsequent. *Rhyne v. Jefferson Standard Life Ins. Co.*, 196 N. C. 717, 147 S. E. 6; *Levan*

v. Metropolitan Life Ins. Co. 138 S. C. 253, 136 S. E. 304. *The reasons which support the 'condition subsequent' rule of the accident cases do not apply to the 'total disability' clause of a life insurance policy."* (Italics ours.)

In *New England Mut. Life Ins. Co. v. Reynolds,* 217 Ala. 307, 116 So. 151, 153, the court said:

"We think there is a manifest distinction between that class of cases and this. In such accident cases, the provision is in the *nature of a condition subsequent* wherein the insurer defends against a *liability already accrued.* In this case the beneficiary relies upon the waiver clause to keep the policy alive, to excuse the payment of premiums. *The disability set up in accident cases is usually the result of the injury insured against. Here there is no insurance against disability, physical or mental."*

See also *Perlman v. New York Life Ins. Co.,* (Pa. 1932) 161 A. 752.

Insurance Company v. Boykin, 12 Wall. 433, 20 L. Ed. 442, cited by respondent involves a fire insurance policy with reference to furnishing proof of loss, a condition subsequent, and has no relation to the question involved in the case at bar.

The case of *Pfeifer v. Missouri State Life Ins. Co.,* 174 Ark. 783, 297 S. W. 847, is in line with the decision of the *Marshall* case, supra, and is to be distinguished from the policy now before the Court.

A splendid review of the authorities is to be found in *Smith v. Missouri State Life Ins. Co.,* 134 Kan. 426, 7 P. (2d) 65, in which the *Swann* case was cited. In holding that mental incapacity did not excuse the insured from furnishing proof under a policy similar to the one at bar, the court said:

"It is impossible to entirely reconcile the two lines of authorities. We think, however, that there is a distinction, in that in the one line of cases the courts have gone far afield to find an ambiguity in the contract, and *have overlooked the fact that the contract does not pretend to insure against disability, but merely makes disability, when coupled with proof or notice to the company, a settlement or waiver of the premium.* The contract is made for the benefit of the insured. On the one hand, the company obligates itself, in the event of total disability, to carry the insurance without charge to the insured, and on the other hand, the insured obligates himself, to furnish, while the policy is in force, proof of such disability. The contract is neither unreasonable or harsh." (Italics ours).

See also *Bloss v. Equitable Life Assur. Soc. of U. S.*, (Wash. 1934) 28 P. (2d) 303.

CONCLUSION

Our contention in this case is sufficiently stated in Iannarelli v. Kansas City Life Ins. Co., (W. Va. 1933) 171 S. E. 748, 750, where the court said:

"Proof of total disability must therefore be made while the policy is in force. The view that such proof may be furnished within a reasonable time after the policy has lapsed carries the idea of resuscitating a contract which under its very terms has become a *nudum pactum*. Such is not the purpose of the disability clause. There is nothing in that clause to excuse the furnishing of proof of disability while the contract is in effect. If the insured becomes insane or disabled so that he cannot himself furnish

proof of disability, that duty can be performed by some one for him, but if no one knows about the policy there is presented an unfortunate situation attributable to the lack of precaution or the non-communicativeness of the insured. *It is not a contingency insured against by the insurer.*" (Italics ours.)

This is in line with *Bergholm v. Peoria Life Ins. Co.*, 284 U. S. 489, 52 S. Ct. 230; and *Egan v. New York Life Ins. Co.*, 67 F. (2d) 899, relied upon by petitioner.

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